THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER: A TRIBUTE TO RICHARD FALK

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I. INTRODUCTION

Forty years ago, when I was a child, the world was a different place. Television was a new invention: I remember watching antennae come out of a man's head on a show called *My Favorite Martian* and wondering how they did that—was he *really* from Mars?. People were sending away for plans to build bomb shelters in their backyards; and a young scholar named Richard Falk wondered about the role that courts of law might play in a world order that we increasingly hoped would become an international legal order.

In his now famous book, *The Role of Domestic Courts in the International Legal Order,*[1] Professor Falk undertook a critical examination of the act of state doctrine, particularly as it was considered in the *Sabbatino* case.[2] He wrestled with the two challenges that were faced by national courts when they adjudicated cases affected by controversies in foreign policy. First, how could courts promote the rule of law while still showing respect for diverse approaches to international law and to the fundamental norms that comprise it? And second, how could courts maintain their independence from the Executive in matters relating to international law without producing decisions that would undermine the proper functioning of the Executive in matters of foreign policy?

Much has changed since that time. The information era is upon us; and men, and women, who are *not* from Mars, go about with telephones strapped to

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1. RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

2. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

their ears speaking to one another via satellite from around the globe. Each day, people brave threats of terrorist attacks that make us look on the days of backyard bomb shelters with a fondness bordering on nostalgia. And the international legal order that was barely a glimmer in Professor Falk's eye has grown to become more and more of a reality.

But national courts continue to face challenges arising from the special role that they serve in the international legal order. And so today, as part of the tribute to Professor Falk's pioneering book, I would like to give you a snapshot of some recent moments in the history of these challenges. Because I expect that many of you are familiar with recent developments in the United States in this area. I want to share with you three recent developments from Canada that capture a sense of the current state of the law, and that give us an idea of how far we have come and what might lie ahead.

These three developments have come in decisions by Canadian courts in three areas in which the courts have wrestled with the questions that Professor Falk described in his book. These areas are: state immunity, the revenue rule, and the enforcement of foreign judgments. While each of these decisions produced results that were a disappointment to the Canadian parties that were involved, the approach taken by the courts to their role in the international legal order shows a degree of sophistication in relation to the challenges described by Professor Falk. That would, I think, have amazed the first readers of his book just about as much as would a cellular telephone.

II. STATE IMMUNITY: *THE BOUZARI CASE*

The first area I want to touch upon is that of state immunity. This summer the Court of Appeal for Ontario released its decision in the *Bouzari* case.[3] In that decision, the Court described the plight of a man who was abducted, imprisoned, and tortured by agents of the Islamic Republic of Iran, and who escaped from Iran eventually coming to live in Canada as a landed immigrant. He sued the State of Iran in a Canadian court for the damages he suffered. He argued that by engaging in torture, and thereby breaching international law, the State of Iran had forfeited its right to enjoy the privilege of state immunity. He also argued that as a country that had committed itself to taking steps to bring an end to torture, Canada had an obligation to provide a forum for civil remedies for victims of torture.

The Court did not agree. It granted immunity to Iran. In this regard, the result was no different from Mr. Bouzari's perspective than it might have been forty years ago. But the process by which the court arrived at this result was remarkably different. As might have been expected, there was no intervention

3. Bouzari v. Iran, [2004] 71 OR.3d 675.

by the Executive to dictate the result, (although that seems less obvious in the United States since the *Altmann* decision[4] of the Supreme Court). But what might not have been expected was that the Court did not feel constrained to be bound by the dictates of the Legislature. To be sure, Canada has a State Immunity Act[5] and the Court did not disregard it. However, remarkably, the Court approached the issues by engaging in a review of Canada's obligations under customary international law, and by considering whether granting immunity as required by the Act would be consistent with those obligations.

Iran did not defend the proceeding, and so it was left to the Attorney General of Canada as intervener to provide the court with an expert to testify on the effect of allegations of torture on the application of the Act. Mr. Bouzari's expert said that Iran had lost its entitlement to claim immunity and that Canada had an obligation to provide access to the courts and to a civil remedy. The Attorney General's expert said that even though torture may be contrary to international law, Canada's treaty obligation to provide access to civil remedies was limited to torture occurring in Canada. Beyond that, no other country deprived foreign states of their immunity under these circumstances. Accordingly, the present state of international law was consistent with granting of immunity as required by the Act. The Court accepted this view and granted immunity.

Now, some were disappointed with the result. Some felt that it was a missed opportunity for Canadian courts to strike a blow for accountability in cases of state-sponsored breaches of international law. But regardless of the result in this particular situation, the courts demonstrated their independence from the other branches of government in their approach to this difficult question. Canadian courts were prepared to determine for themselves the role that they might best play in the international legal order. The courts recognized the roles that might be played by other branches of government and by other institutions and found mechanisms for responding to the underlying complaint.

III. THE REVENUE RULE: *THE IVEY CASE*

The second area I want to mention is the revenue rule and the way in which it has resulted in earlier courts denying relief to claimants and judgment creditors in cases that would otherwise be admissible as ordinary civil claims. I should clarify that in Canada we do not have "revenue rule" *per se,* although our case law has developed just as it has in the United States, from decisions of the English courts, such as in *Holman v. Johnson.*[6] Rather, we have an

4. Republic of Austria v. Altmann, 541 U.S. 677 (2004).

5. State Immunity Act, R.S.C., ch. S-18, (1975) (Can.).

6. Holman v. Johnson, [1775-1802] All E.R. Rep. 98 (K.B. 1775).

exception to the application of foreign laws and to the enforcement of foreign judgments for claims or judgments that are based on foreign *public* laws. We tend to describe this in terms of an exception for foreign penal laws (that is, fines), foreign revenue laws (that is, taxes), and "other foreign public laws" (a term which is intended to describe other laws that give effect to purely governmental interests).[7]

While this exception still exists in theory and is described from time to time by the courts, it is less and less applied. Indeed, the way in which it is *not* applied by Canadian courts is indicative of their interpretation of the role of courts in the international legal order. A striking example of this is the decision in the *Ivey* case, or more properly, *United States of America v. Ivey*.[8] In that case, the United States wanted to enforce a judgment in Ontario based on a CERCLA order (Comprehensive Environmental Response and Compensation Liability Act). The problem addressed was that under the foreign public law exception, a claim made by a foreign government, or one that would result in an award that would accrue to a foreign government, would not be entertained by Canadian courts.

As it happened, the Ontario courts did enforce the judgment. In doing so, they appeared to be motivated, in part, by one point that was a matter of simple common sense: this was not a situation in which enforcing the judgment would be tantamount to giving effect to the sovereign will of a foreign power. Rather, it was just a situation in which the courts would be holding a defendant accountable for harm caused by him in another country while doing business there. The striking part about the result, though, was that the court was prepared to go beyond the superficial indications that this judgment was subject to the foreign public law exception. It was prepared to look at the substance of the claim and the relief granted. Perhaps even more striking was that the court recommended a flexible interpretation of the foreign public law exception so that the application would not prevent the court from providing suitable support for governmental schemes designed to further public interests that are of obvious trans-boundary significance, such as protection of the environment. The courts clearly took an approach to comity that called upon them not to refrain from engaging in matters that might bear on foreign policy, but rather to take positive steps to cooperate with foreign courts and lend support to them —where this seems warranted.

Some might say that in doing so, the courts would undermine the capacity of the Executive to make arrangements with other countries that are the most

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7. J. WALKER, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS (Markham: Butterworths, 6th ed. 2005).

8. United States v. Ivey, [1995], 26 O.R.(3d), *aff'd*, [1996] 30 O.R. (3d)370, *leave to appeal denied*, [1997] 2 S.C.R. x.

favorable for Canadians.[9] And some might say that such a restriction on access to Canadian courts by foreign governments should be lifted only for the governments of foreign states whose courts provide similar access to the Canadian government.[10] But I think that in the *Ivey* case, the courts demonstrated strength in their independence from the other branches of government and their preparedness to respond to what they regarded as the requirements of their role in the international legal order.[11]

IV. FOREIGN JUDGMENTS: *THE BEALS CASE*

The third area that I want to talk about is that of the enforcement of foreign judgments and the decision of the Supreme Court of Canada in the *Beals* case.[12] It may seem odd to include an ordinary private law judgment enforcement case among cases that relate more directly to foreign policy and to the interests of foreign sovereign powers, but I think that there is good reason for including this case here. In the *Beals* case, the Supreme Court of Canada confirmed that Canadian courts should apply jurisdictional standards to foreign judgments that are similar to those applied under the Uniform Foreign Money Judgments Recognition Act of 1962. Just to be clear, Canadian courts had been doing that since the Supreme Court of Canada approved the use of the standard for judgments from other provinces in 1990.[13]

The result in the *Beals* case was rather harsh because it involved a claim based on the purchase of a vacant lot from two Ontario couples in Florida for $8,000. This claim had mysteriously mushroomed into an award that, at the time of enforcement, had grown to over one million dollars. Various features of the procedure raised what seemed to many to be serious questions of fairness, and there is reason to be concerned that the result could encourage abuse.[14]

But I want to highlight a point on which I think this decision represents an advance on the previous state of the law. Under what we call the old rules for the enforcement of judgments, or what is sometimes called, "the English rules," the choice of forum in cross-border disputes is policed by the parties. Or, to be more accurate, the defendant has a veto over the plaintiff's choice of forum, even if that choice is a sensible one. This is because a judgment is enforceable internationally only when a defendant has submitted to the jurisdiction of the

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9. V. Black, *Old and in the Way: The Revenue Rule and Big Tobacco* 38 CAN. BUS. L.J. 1 (2003).

10. *Id.*

11. Janet Walker, *Foreign Public Law and the Colour of Comity: What's the Difference Between Friends?* 38 CAN. BUS. L.J. 36 (2003).

12. Beals v. Saldanha, [2003] 3 S.C.R. 416.

13. De Savoye v. Morguard Investments Ltd., [1990] 3 S.C.R. 1077.

14. JanetWalker, *Beals v. Saldanha: Striking the Comity Balance Anew*, 5 CAN. INT'L LAW. 28 (2002).

court issuing the judgment or when the defendant was served there.[15] Under the new rules, a judgment given by a court in a forum with a real and substantial connection to the claim will be entitled to enforcement.

I think this is a step forward. It reflects a view of the network of courts of civil jurisdiction around the world that conceives of it as less like the lawless highways of old, populated by highwayman and other perils, and more like the business sectors of major modern cities. It encourages defendants to respond to claims in the courts chosen by plaintiffs and to direct any challenges to plaintiffs' choices of court *to* those courts. To be sure, this deference to foreign courts exposes defendants with assets in Canada to risks that they were once in a position to control for themselves—by ignoring foreign proceedings. But the need for rules to protect litigants from specific concerns about fairness is not a reason to turn our backs on the need to develop a more generous approach to the recognition and enforcement of foreign judgments generally. For the many participants in this conference who have toiled over the years to develop a workable multilateral judgments convention, I am sure that I am only preaching to the converted. My point, though, is to underscore the extent to which some courts are willing to embrace this new respect for the role of domestic courts in fostering the security of transactions across borders that is so important to the international legal order.

V. CONCLUSION

And so, with these three examples, I hope that I have given you a sense of the distance that the courts have come in meeting the complex challenges they face in fulfilling their important role in the international legal order. As far as they have come, you can see in the mixed results of each case how far they have yet to go, particularly as the international legal order itself continues to develop. In this regard, I wonder if there might be some young member of the audience here today who, some forty years from now, might give a talk to the American Branch of the International Law Association on the further progress that has been made in this area. I do not think that we can fully imagine the role that domestic courts will play in the international legal order in the year 2044. But I think that we can safely assume that the man that we might see on the street with the antennae coming out of his head would not, in fact, be a Martian.

15. Emanuel v. Symon, 1908 P. 302 (Eng. C.A..).